

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7210
~~76-1778~~

United States Court of Appeals

FOR THE SECOND CIRCUIT

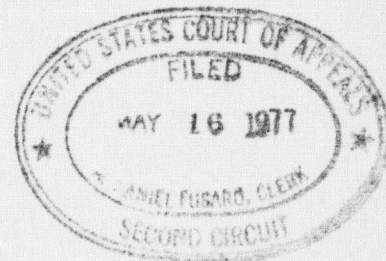
PAN AMERICAN SEAFOOD INC.,

Plaintiff-Appellant,

—against—

UNITED STATES LINES, INC.,

Defendant-Appellee.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLEE
UNITED STATES LINES, INC.

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Statement of the Issues.

- I. Did the District Court err in granting summary judgment for the Defendant-Appellee and in dismissing the complaint?
- II. Did the District Court err in finding that there were no triable issues of fact?
- III. Did the District Court err in finding that Plaintiff-Appellant failed to plead and prove a prima facie case or that having done so Defendant-Appellee had properly rebutted such prima facie case?

It is the contention of the Defendant-Appellee that these questions should be answered in the negative and that the decision below and the judgment entered on that decision should be affirmed with costs.

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1778.

PAN AMERICAN SEAFOOD INC.,

Plaintiff-Appellant,

-against-

UNITED STATES LINES, INC.,

Defendant-Appellee.

On Appeal From the United States District
Court for the Southern District of New York.

BRIEF OF DEFENDANT-APPELLEE.

Statement of Case.

A. Preliminary Statement.

This brief is submitted in opposition to the appeal (106a)* of plaintiff-appellant, Pan American Seafood, Inc., ("Pan American") from a judgment (105a) entered in this action on the 28th day of January, 1977, in favor of defendant-appellee,

* All references are to pages of the appendix.

United States Lines, Inc., ("United States Lines") and against Pan American dismissing the complaint on a cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure based on a memorandum decision of the Hon. VINCENT L. BRODERICK, United States District Judge, dated the 26th day of January, 1977 (102a).

B. Statement of Facts.

Basically the facts in this case are not disputed to any extent in the motion papers presented to the Court below but on this appeal Pan American attempts to create an issue of fact regarding the seals that were placed on each of the two containers.

We are here concerned with two shipments, identical in nature as well as in documentation, and, therefore, we will discuss both as one.

The claim of Pan American is for alleged shortage in the two shipments. When said shipments were ready to go forward in Panama the shipper invited the agents for United States Lines and the trucker to the shipper's warehouse where a physical tally was made by each of them as the cartons were being loaded into the container. "At the end of loading all three parties compare their records and certify same". (41a, 64a). "Container is then sealed by shippers and padlocked by our (United States Line's) representative for on-carriage to the pier. This padlock is removed immediately before container goes aboard ship or if more convenient aboard the vessel". (89a, 92a).

A copy of the letter setting forth the above procedure (89a) was sent to the shipper with an invitation to the consignee to feel free to corroborate this information with their shipper but evidently that was not done by Pan American, or having been done, Pan American did not deem it helpful to its position and therefore did not produce it on the motion below.

The tally signed by the representatives of the shipper, the trucker and the carrier, (41a), shows container No. USLU 4303073 with seals Nos. 56806, 06062 and 05986. The tally signed with regard to the shipment in container NO. USLU 4307762 shows the seals on said container to bear Nos. 49396, 05905, and 05906. (64a).

The dock receipts issued for the shipment aboard the AMERICAN ASTRONAUT (42a-50a) show the receipt of 807 "cartones"; those issued for the shipment aboard the AMERICAN LYNX show the receipt of a total of 866 "cartones" (66a-74a).

The United States Lines issued a number of identical bills of lading showing the receipt of a sealed container containing a specified number of "cartons of frozen shrimp said to be unpeeled" or "peeled" in some instances. In each container there were also a small number of "cartons of frozen lobster tail".

The bills of lading for the container placed aboard the AMERICAN ASTRONAUT shows the container to bear No. USLU 4303073 (33a-40a), and the seals thereon bearing Nos. 05986, 06062, and 56806. As to the shipment aboard the AMERICAN LYNX, the bills of lading show the container to be No. USLU 4307762 (55a-63a) and

the seals thereon bearing Nos. 05905, 05906 and 49396.

Delivery of each of the containers was effected at the Howland Hook Container Terminal, in Staten Island, New York. (81a-82a, 84a, 91a, 98a).

Container No. USLU 4307762 was inspected externally and accepted by a driver for Frigid Express on October 8, 1975, at 11:38 A.M., as shown by the time stamp in the upper right hand corner of the Equipment Condition Inspection Report signed by said driver at the lower right hand corner (91a). In the box at the lower right hand corner of said report entitled "U.S. Customs Requirements" appear the initials "WHF". These indicate that the container had to be inspected by U. S. Customs prior to leaving the terminal. (83a-84a). Such inspection was accomplished on that day as indicated by the time stamp of the U. S. Customs Inspector. (91a).

Container No. USLU 4303073 was inspected externally and accepted by a driver for Frigid Express on January 14, 1976, at some time between 9:32 and 9:54 A.M. (96a). The driver thereafter proceeded to have his documents checked by customs between 9:54 A.M. and 9:57 A.M. He was directed to wharf the container as denoted by the "WHF" on the Inspection Report (98a). The inspection took place between 10:17 and 10:21 A.M., and he departed from the terminal at 10:34 A.M. (82a, 83a, 96a, 98a).

When the containers were presented for inspection by the U.S. Customs, the inspector caused one of the seals on each of the containers to be broken so as to enable him to open a

door through which the inspector could verify the contents. Upon completing the inspection, the inspector directed that the door be closed and re-sealed (82a). On Container No. USLU 4307762 the "old seal" bearing No. 05906 was removed at the direction of the Customs Inspector and a "new seal" bearing No. 02974 was installed in its place (91a). As to Container No. USLU 4303073, the "old seal" bearing No. 56806 was removed and thereafter replaced by Customs with a "new seal" bearing No. 08125 (98a).**

The above procedure took place in the presence of a U.S. Customs Inspector, a member of the Security Department of the terminal and the driver of the truck who picked up the container for Pan American (84a-85a).

The numbers on the seals which had been placed on each container in Panama were verified by Mr. Vernell of United States Lines with their agents in Panama. All of the numbers reported by the carrier's agent corresponded with the seal numbers on the bills of lading, with one exception (93a, 94a, 95a). Because of an error "through misreading handwriting" (95a) seal number 56806 was originally reported (93a) as No. 56800, but that was quickly corrected when the discrepancy was pointed out to Panama (94a, 95a).

Plaintiff-appellant, at page 5 of its brief, attempts to create a triable issue of fact from this apparent error.

****NOTE:** In the reproduction of the Equipment Condition Inspection Reports (91a, 98a), in the Appendix to Brief of Plaintiff-Appellant, a portion of the left hand margin of each of said exhibits was omitted. On the sixth line from the bottom of each of said exhibits the court will note the box entitled "new seal". In the box immediately to the left of said box the words "old seal" should appear. The complete forms should show container 4307762 having a new seal No. 02974 and the old seal as No. 05906; Container 4303073 having a new seal No. 08125 and the old seal as No. 56806.

Once the containers were delivered to Frigid Express at the Howland Hook Terminal and subsequently removed therefrom, they were in the exclusive possession and control of Pan American and United States Lines had no further responsibility for them. 81a, 82a.

The containers were transported to Merchants Refrigerating Company after removal from the terminal. The Receiving Report from that company shows that the container from the AMERICAN LYNX (USLU 4303776) was received with the seal No. 02974 intact (75a). This was the seal which had been placed on the container by the customs inspector. As to the Receiving Report for the container from the AMERICAN ASTRONAUT (USLU 4303073), the container from which there was an alleged loss of \$11,799.68, not only was the seal placed thereon by customs (#08125) found intact on the door of the container but a seal placed thereon in Panama (05986) (41a) was also found intact (52a) on said door.

POINT I.

DELIVERY OF PLAINTIFF-APPELLANT'S
CONTAINERS WAS ACCOMPLISHED AT
DEFENDANT-APPELLEE'S TERMINAL.

Rule 56(e) of the Federal Rules of Civil Procedure provides that on a motion for summary judgment

"(S)upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein.--"

The affidavit of John H. Vernell meets all of the above requirements. It sets forth facts which are personally known to him or which are based upon documents which were received and/or prepared by and for him in the regular course of his duties. Said documents constitute business records admissible in evidence as exceptions to the hearsay rule in accordance with Rule 803(6) of the Federal Rules of Evidence.

The same cannot be said of the affidavit submitted in support of plaintiff-appellant's motion. The affidavit of Marvin Luboff is merely an argument in support of the motion which does not present any facts to the Court and should be disregarded.

The affidavit of Ronnie D. Koenig has attached thereto a number of documents which would also be admissible in evidence as business records and are not contested on this appeal. However, said affidavit contains a number of erroneous conclusions which should be disregarded. This is

especially true with regard to the conclusions set forth in paragraphs 8 and 17 of said affidavit (9a and 13a) which state that the "aforesaid sealed shipment was delivered to Pan American on January 14, 1976 (October 8, 1975) by delivery to Merchants Refrigerating Company at 99 Tenth Avenue, New York, New York, seal intact, for cold storage for the account of plaintiff."

We submit that the delivery of the two containers to plaintiff-appellant took place at the Howland Hook Terminal of the defendant-appellee, as is demonstrated by the receipts executed by the driver for Frigid Express (91a, 98a) and described by Mr. Vernell (80a-85a).

As was stated in American Hoesch Inc. v. S.S. Aubade, (USDC D. So. Car. 1970), 316 F. Supp. 1193,

"--'Delivery' is a concept which has been subject of considerable litigation in several areas of the law. It appears from the discussion of it considered by the court that delivery implies mutual acts of the carrier and the consignees. Ostrandess vs. Brown 15 JOHNS 39, 8 Am. Dec. 211 (N.Y. 1818). It is a more inclusive term than "unloading," implying acceptance or agreement to accept by or, at least communication to, the consignee, coupled with relinquishment of possession or control by the carrier. --"

"-- The term delivery is not synonymous with control, but delivery implies a change of possession, a change of control. --"

The facts before this court clearly show that there were mutual acts between the carrier and the consignee whereby the consignee's truckers by their signature on the lower right hand corner of the Inspection Report acknowledged receipt of the containers (91a, 98a) and at this point there was an actual passing

of possession to consignee's agent and relinquishment of possession and control by the carrier. At this point the carrier's responsibility for the containers and their contents came to an end. David Crystal v. The Cunard Steamship Co. Ltd., (2 Cir-1965) 339 F.2d 295; Leathers Best v. S.S. MORMACLYNX (2 Cir.-1971) 451 F.2d 800.

POINT II

THE COURT BELOW PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE AS THE RECORD BEFORE IT SHOWED THAT THERE WERE NO MATERIAL ISSUES OF FACT AND THAT THE CARRIER HAD DELIVERED WHAT IT HAD RECEIVED.

This court recently considered the question of whether or not summary judgment had been properly granted in United States v. Matheson, 532 F.2d 809, (1976), wherein it stated at page 813, as follows:

"[1-3] In deciding whether the district court acted properly in granting summary judgment in favor of the government, we are, of course, bound by a long-standing principle recently reaffirmed by us, see Judge v. Buffalo, 524 F.2d 1321 (2d Cir. 1975); Heymann v. Commerce & Industry Ins. Co., 524 F.2d 1317 (2d Cir. 1975); Rhoads v. McFerran, 517 F.2d 66, 67-68 (2d Cir. 1975), that the court's function upon a motion for summary judgment is not to resolve issues of fact but to determine whether any material factual issues are raised after resolving all questionable inferences in favor of the party against whom the judgment is sought. Only if no material factual issues exist may summary judgment be granted. However, it is equally true that summary judgment should not be denied where the only issues raised are frivolous or immaterial ones which would simply serve to provide an exercise in futility or a purposeless trial for the district court, particularly where no jury has been demanded. See Beal v. Lindsey, 468 F.2d 287, 292 (2d Cir. 1972); Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F.2d 627, 628 (2d Cir.) cert. denied, 308 U.S. 597, 60 S.Ct. 131, 84 L.Ed. 499 (1940).

The criteria set forth above is that summary judgment can only be granted if no material factual issue exists.

The court below correctly found that there was "no genuine issue of material fact" and thereupon granted summary judgment in favor of defendant-appellee upon its finding that "defendant carrier delivered, with respect to each of the two shipments, precisely what it received, which was a sealed container.---"

The rights of the parties are governed by the bill of lading and the Carriage of Goods by Sea Act, 1936 (46 USC 1300). Said statute "covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 USC 1301(e).)

There was no need for the court below to make a finding of fact to arrive at the conclusion that the "carrier delivered, --- precisely what it received". The existence of the unbroken seals from the time of delivery of the containers to the carrier in Panama to their delivery to Pan American in New York, is admitted by plaintiff-appellant in its moving papers and the admission is confirmed by the documents before the court.

Mr. Koenig, in paragraph 8 and 17 (9a,14a) of his affidavit admits that the containers were received in a sealed condition.

Mr. Luboff, in paragraph 3 of his affidavit (98a) concedes that the "containers were delivered with seals intact".

The notice of claim on the AMERICAN ASTRONAUT claim dated January 16, 1976 states that the seal placed on the container in Panama (05986) as well as that placed on it by U.S. Customs (08125) were intact upon receipt of the container. (53a).

Mr. Luboff belatedly seeks to create an issue of fact regarding the presence of seals upon the containers. His arguments are contrary to the record which he established and also contrary to the documents produced by both parties. Said documents trace the continuity of unbroken seals from the time the containers were stuffed and delivered to the carrier to the delivery to the consignee. The seal numbers first appeared on the tallies signed by the representatives of the shipper, the trucker and the carrier in Panama, (41a,64a); they next appeared on the bills of lading (33a-40a and 55a-63a); their numbers are verified by Mr. Vernell (87a,89a,92a,93a,94a,95a); the removal of one seal on each container and its replacement by order of U.S. Customs officials shows on the Inspection Reports signed by consignee's trucker, (82a-85a, 91a, 98a), after which the containers were removed from defendant-appellant's premises.

The continuity of unbroken seals as stated in defendant-appellee's statement pursuant to Rule 9(g) of the Local Rules of the Southern District of New York are not rebutted by plaintiff-appellant and therefore are admitted.

Their existence is confirmed by the warehousing company whose Receiving Report not only confirms the seals

placed on each container by the U. S. Customs to be intact, but also confirm that one of the seals which had been placed on container USLU #4303073 in Panama was also intact on receipt of said container by the warehouse company. (52a,75a).

We submit that said facts can only result in the conclusion arrived at by the Court below that the carrier had delivered what it had received. Having done so, defendant-appellee has fulfilled its contractual and legal obligations requiring a dismissal of the complaint. Caterpillar Overseas S.A. v. Expedito, (2 Cir. 1963), 318 F. 2d 723; David Crystal v. Cunard Steamship Co. Ltd., (supra); Leathers Best v. S.S. MORMACLYNX, (supra).

POINT III.

DEFENDANT-APPELLEE IS ENTITLED TO A DISMISSAL
OF THE COMPLAINT AS A MATTER OF LAW.

Plaintiff-appellant claims to have established a prima facie case on the basis of the clean bill of lading and the alleged short delivery of the contents of the two containers. A clean bill of lading is not necessarily proof of the good order and condition of the contents of a container. Aetna Insurance Co. v. M/T Grena, (La. Ct. of Appeals -1969) 1969 A.M.C. 2449 (not officially reported).

As was said in Levatino Co. Inc. v. S.S. Norifjell et al, (SDNY -1964), 231 F. Supp. 307,

"---- the admission represented by the recital of 'apparent good order and condition' in a bill of lading goes no further than to create prima facie proof that to the eye the boxes were secure and sufficient, and that the lemons, so far as visible, were not damaged'."

In the case before the court the clean bill of lading is only a receipt for the container in which had been placed a number of cartons said to contain frozen shrimp and lobster tails. There is no evidence that the cartons actually contained frozen shrimp and lobster tails.

Neither is there any evidence that the missing cartons were missing at the time of delivery by the carrier to Pan

American's agent. Mr. Koenig, who has no personal knowledge of the facts, states that there was a shortage on the basis of what he has been told. No one has come forward to state what may have happened after the containers were removed from the carrier's terminal until someone reported to Mr. Koenig that a shortage existed.

Assuming arguendo that plaintiff-appellant has established a prima facie case, the record shows that it has been rebutted by defendant-appellee by proof of the continuity of unbroken seals on the containers.

In United States v. United Georgia Railway Co., (USDC-ED TENN.S.D.-1976) 411 F. Supp. 1023, the continuity of unbroken seals was established between unloading points in the rail transportation of goods. The court held at page 1027 that

"--- the presence of unbroken seals between delivery points, and the fact that unloading was performed by the consignees combine to rebut the plaintiff's prima facie case. The plaintiff not having come forward with any affirmative evidence of negligence by any carrier in any of these shipments, the defendant's motion for summary judgment will be sustained."

We submit that the continuity of unbroken seals from delivery to the carrier until delivery to the consignee rebuts the prima facie case claimed to have been established by plaintiff-appellant. Consequently, there being no evidence of negligence on the part of defendant-appellee as to the cause of the alleged loss, the complaint must be dismissed as a matter of law. Consolidated Cork v. Jugoslovenska Linijska, (SDNY-1970) 318 F. Supp. 1209; Kinderman & Sons v. N.Y.K. Line (ED Pa.- 1971)

322 F. Supp. 939; Caterpillar Overseas v. Expeditor (supra).

POINT IV.

THE DECISION OF THE COURT BELOW SHOULD
BE AFFIRMED IN ALL RESPECTS.

Dated, New York, N.Y.,
May 12, 1977.

Respectfully Submitted,

KIRLIN, CAMPBELL & KEATING,
Attorneys for Defendant-Appellee.

Enrico S. Sanfilippo,
Of Counsel.

CERTIFICATE OF SERVICE OF
BRIEF OF DEFENDANT-APPELLEE

WE HEREBY CERTIFY that two (2) copies of the attached
brief of Defendant-Appellee was this date served by mail on the
following:

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May 16, 1977

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